

**STATE BOARD OF EQUALIZATION**

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October 12, 1993

BURTON W. OLIVER  
Executive Director

Ms. H--- L---  
B--- M---, Inc.  
XXXX East --th Street  
---, -- XXXXX-XXXX

Re: B--- M---, Inc.  
SC -- XX-XXXXXX

Dear Ms. L---:

This is in response to your letters to the Board dated June 17, 1993, August 15, 1993, and October 1, 1993. In your August 15 letter you state in part:

"Relative to your letter of July 2, 1993 we are providing an invoice on which we taxed the taxes on calibration and start up. The customer said that we erred and we did deduct the taxes on these procedures.

"We are now seeking an opinion as to whether we processed the invoice incorrectly. The Flow Lab Calibration and Start Up procedures are performed on flow meters which we sell and we do need to know your opinion relative to taxes thereon."

Revenue and Taxation Code section 6051 imposes a sales tax on all retailers measured by their gross receipts from retail sales in this state of tangible personal property. Revenue and Taxation Code section 6201 imposes a use tax on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state. The use tax, which complements the sales tax, is imposed upon out-of-state purchases of property for use in California.

Since it appears from your letters that you are only furnishing the meters, not furnishing and installing the meters, we assume that your contracts are not construction contracts. If this assumption is incorrect, our conclusions in this letter may not apply to the transactions you

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describe.

As will be discussed in further detail below, the appropriate tax on your transactions is use tax. Use tax is measured by the sales price which means the total amount for which tangible personal property is sold. The sales price includes labor and service costs and services that are a part of the sale but does not include installation charges. Rev. & Tax. Code § 6011.

It appears from your letters that flow calibration and start up are procedures that are performed at your manufacturing facility rather than at the jobsite during installation. Therefore, we regard such procedures as assembly or fabrication labor. The charges for such procedures are subject to tax.

In your August 15, 1993 letter you further state:

"We receive orders from the direct customer or from representatives ordering devices and ask that they be shipped to their customer in California. We ship the orders as requested by the customer, i.e., air, UPS, parcel post, etc. Most of our purchase orders received indicate f.o.b. Tulsa, OK, i.e., title to devices/products passes here in Tulsa. Only a very few orders show f.o.b. xxxxxx, CA."

Where title to tangible personal property passes outside of California, the applicable tax is use tax. The use tax is imposed upon the purchaser, but if the retailer is engaged in business in California and makes sales of tangible personal property for storage, use, or other consumption in this state, he or she must, at the time of making the sale, collect the use tax from the purchaser and pay it to the state. Rev. & Tax. Code § 6203. The purchaser must pay the use tax to the retailer if the retailer holds a seller's permit or is registered with the Board.

You indicate that title usually passes in Tulsa. Therefore, use tax applies to these transactions. Since you are registered with the Board, you must collect use tax from your customers who order directly from you if you ship or deliver the property to California. Even if title passes in California, use tax rather than sales applies unless there is participation in the sale by a local office or branch as described in Regulation 1620(a)(2)(A) and (B), copy enclosed.

We do not have enough facts to determine if you are the retailer liable for tax in those transactions in which a customer orders a device from a representative. If the representative solicits orders in your name or on your order forms, if you reserve the right to accept or decline orders and to accept returns or make other adjustments with customers, and if you issue invoices to the customer in your name and the customer pays you directly, you are the retailer. Otherwise, the representative may be the retailer, depending upon the facts.

In your October 1, 1993 letter you state:

"We are requesting advice relative to a customer of ours in Missouri who requested that we make a shipment to their customer in California. The MO customer does not have a resale certificate and I taxed this one order.

"Now it appears that there will be future orders to the same customer in California with a possible transfer to Israel, after the valves are incorporated into a system. They do not have a time element or a definite number of valves to be incorporated. They feel that they should not be charged tax on any of these orders and I do need an opinion from you.

"I am enclosing some documentation which the representative involved in the order has sent to us, as provided by your facility."

You attached an invoice which shows that the property was shipped to I--- C--- in Auburn, California and that the property was sold to C--- S--- D--- of Ballwin, Missouri.

We regard you as the retailer in this transaction. Even if C--- S--- is not your agent or representative soliciting orders on your behalf, under a special provision of the Revenue and Taxation Code (section 6007), you are the retailer if C--- S--- is not engaged in business in California. Our records show that C--- S--- is not registered with the Board. Therefore, you should collect and pay tax on these transactions.

Revenue and Taxation Code section 6009.1 provides that "storage" and "use" do not include the keeping, retaining, or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state. Rev. & Tax. Code § 6009.1.

If the California customer knew in advance which valves were being incorporated into property to be transported to Israel, the customer could issue you an exemption certificate for section 6009.1. According to your letter, however, the customer does not know in advance which valves will be removed from California. Therefore, the customer must pay use tax to you and then file a claim for refund when the valves are removed from California.

If you have further questions regarding Sales and Use Tax Law, please do not hesitate to write again.

Sincerely,

Elizabeth Abreu  
Tax Counsel

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